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EPIC CONSIDERATIONS: THE SPEECH THAT THE SUPREME  
COURT WOULD NOT HEAR IN *SNYDER V. PHELPS*

*Jeffrey Shulman\**

A few weeks after the funeral, one of the picketers posted a message on Westboro's Web site discussing the picketing and containing religiously oriented denunciations of the Snyders, interspersed among lengthy Bible quotations. Snyder discovered the posting, referred to by the parties as the "epic," during an Internet search for his son's name. The epic is not properly before us and does not factor in our analysis.<sup>1</sup>

In declining to consider the "epic" posted by the Westboro Baptist Church on its web site, the Supreme Court took most (but not quite all) of the good constitutional stuff out of *Snyder v. Phelps*. The Court may have sought to make this an easy case by considering only the contents of the church's picketing placards. For the Court, the placards highlighted such issues of public import as "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy."<sup>2</sup> On grounds that we might charitably call dubious,<sup>3</sup> the Court chose not to "hear" those

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<sup>1</sup> *Snyder v. Phelps*, 562 U.S. \_\_\_, 131 S. Ct. 1207, 1214 n.1 (2011).

<sup>2</sup> *Id.* at 1217.

<sup>3</sup> See *id.* at 1214 n.1 ("Although the epic was submitted to the jury and discussed in the courts below, Snyder never mentioned it in his petition for certiorari. See Pet. for Cert. *i* ('Snyder's claim arose out of Phelps' intentional acts at *Snyder's son's funeral*' (emphasis added)); this Court's Rule 14.1(g) (petition must contain statement 'setting out the facts material to consideration of the question presented'). Nor did Snyder respond to the statement in the opposition to certiorari that '[t]hrough the epic was asserted as a basis for the claims at trial, the petition . . . appears to be addressing only claims based on the picketing.' Brief in Opposition 9. Snyder devoted only one paragraph in the argument section of his opening merits brief to the epic. Given the foregoing and the fact that an Internet posting may raise distinct issues in this context, we decline to consider the epic in deciding this case."). *But cf.* *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504-05 (1984) ("In each of these areas [of free speech jurisprudence], the limits of the unprotected

parts of the church’s speech that most clearly and most viciously attacked the Snyders – speech, that is, on matters of purely private concern.<sup>4</sup> In deciding whether speech is on a matter of public or private concern, the Court is required “to examine the ‘content, form, and context’ of that speech, ‘as revealed by the whole record.’”<sup>5</sup> Having determined the “content, form, and context” of Westboro’s speech without reference to half of the record, Justice Roberts was able to describe the church’s speech as “fairly characterized as constituting speech on a matter of public concern” – speech, that is, worthy of special protection under the First Amendment.<sup>6</sup>

Even without the epic before it, however, it was not easy for the Court to turn a deaf ear to the personal nature of the church’s verbal assault. The Fourth Circuit had observed that some of the church’s signs (and, of course, the epic) could reasonably be construed as referring personally to Matthew Snyder.<sup>7</sup> This made no legal difference to the circuit court because, in its view, no reasonable reader would interpret the signs as anything but hyperbolic rhetoric.<sup>8</sup> The Supreme

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category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.”)

<sup>4</sup> See *Snyder*, 131 S. Ct. at 1226 (Alito, J., dissenting):

“God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD-PERIOD! You did JUST THE OPPOSITE—you raised him for the devil.

...

“Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their own souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.

...

“Then after all that they sent him to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him in the cross hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?”

<sup>5</sup> *Id.* at 1216 (quoting *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).

<sup>6</sup> *Id.* at 1217 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

<sup>7</sup> See *Snyder v. Phelps*, 580 F.3d 206, 224 (4th Cir. 2009) (“A reasonable reader could interpret these signs, therefore, as referring to Snyder or his son only, or, on the other hand, to a collective audience (or even the nation as a whole).”).

<sup>8</sup> See *id.* (“We need not resolve this question of usage, however, because a reasonable reader would not interpret the statements on these two signs as asserting actual and provable facts. Whether an individual is ‘Going to Hell’ or whether God approves of someone’s character could not possibly be subject to objective verification. Thus, even if the reasonable reader understood the ‘you’ in these signs to refer to Snyder or his son, no such reader would understand those statements

Court chose not to follow the Fourth Circuit down this doctrinal path – and for good reason, for such reasoning would effectively leave victims of personally abusive speech without a legal remedy. And plaintiffs like the Snyders would be left the victims of a court-created constitutional catch-22. If Westboro’s speech was not about the Snyders, it would be protected as a matter of public concern; but if the church’s speech was about the Snyders (and thus not a matter of public concern), it would be protected as hyperbolic rhetoric. Under the reasoning of the Fourth Circuit, a speech-based claim of emotional injury is only viable if the defendant speaks as an objective reporter of facts. This position makes the emotional distress tort, at least when based on injurious speech, redundant of defamation claims. If the Supreme Court let this decision stand, groups such as Westboro would happily redouble their rhetorical efforts. The more distasteful and vitriolic their speech, the more worthy it would be of constitutional protection.<sup>9</sup>

But in departing from the path taken by the Fourth Circuit, the Supreme Court wandered close to a doctrinal quagmire of its own making. Writing for the Court, Justice Roberts noted, half-heartedly, the possibility that a few of the signs might be viewed “as containing messages related to Matthew Snyder or the Snyders specifically.”<sup>10</sup> Rather than dismiss these messages as the work of hysterical protesters, however, Roberts diluted their significance by, so to speak, watering them down with messages of a public nature, so that even if some messages, in fact, were personally targeted, “that would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.”<sup>11</sup>

The peculiar nature of this doctrinal novelty was remarked upon by Justice Alito.<sup>12</sup> For Alito, the protest and the epic were not separable parts of the church’s message,<sup>13</sup> and the epic, with its personal references to the Snyder family, belied any notion that the church’s speech was

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(‘You’re Going to Hell’ and ‘God Hates You’) to assert provable facts about either of them.”).

<sup>9</sup> *Cf. Snyder*, 131 S. Ct. at 1224 (Alito, J., dissenting) (“The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain.”).

<sup>10</sup> *See id.* at 1217.

<sup>11</sup> *Id.*

<sup>12</sup> *See id.* at 1227 (Alito, J. dissenting) (“I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected. The First Amendment allows recovery for defamatory statements that are interspersed with nondefamatory statements on matters of public concern, and there is no good reason why respondents’ attack on Matthew Snyder and his family should be treated differently.”); *cf. id.* at 1221 (Breyer, J., concurring) (“The dissent requires us to ask whether our holding unreasonably limits liability for intentional infliction of emotional distress—to the point where A (in order to draw attention to his views on a public matter) might launch a verbal assault upon B, a private person, publicly revealing the most intimate details of B’s private life, while knowing that the revelation will cause B severe emotional harm. Does our decision leave the State powerless to protect the individual against invasions of, *e.g.*, personal privacy, even in the most horrendous of such circumstances?”).

<sup>13</sup> *See id.* at 1225 n.15 (Alito, J., dissenting).

related to a matter of public concern.<sup>14</sup> But even if the church's dominant theme had been a public one, Alito argued, it made no sense to immunize actionable speech "simply because it is interspersed with speech that is protected."<sup>15</sup> The better course, he proposed, would be to separate, constitutionally speaking, the wheat from the chaff.<sup>16</sup>

In all likelihood, the Court had no intention of creating a new "central thrust" or "dominant theme" doctrine.<sup>17</sup> Indeed, it would appear that the Court was trying hard to avoid creating new doctrine – and being more than a little linguistically loose in the process. What the Court apparently did not want to do was to tackle the question left unaddressed in *Hustler v. Falwell*<sup>18</sup> – whether speech on a matter of public concern directed at a private figure may be actionable. It was clear at oral argument that a majority on the Court was unlikely to agree with 1) a categorical treatment of the church's speech as merely a matter of private concern, or 2) a too facile assessment of the speech as entirely a matter of public concern.<sup>19</sup> Part public, part private, Westboro's speech placed before the Court the difficult question of what protection to afford speakers who make a private party the unwilling instrument of their public message.<sup>20</sup> The Court limited its holding to the facts of the case – the facts absent the epic<sup>21</sup> – and on these facts the Court was content to characterize the church's speech, fairly or not, as a public concern, thus avoiding the hard work of culling wheat from chaff.<sup>22</sup>

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<sup>14</sup> *See id.* at 1226 (Alito, J., dissenting) ("[I]t is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military. Both Matthew and petitioner were private figures, and this attack was not speech on a matter of public concern. While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder's purely private conduct does not.") (footnote omitted).

<sup>15</sup> *Id.* at 1227.

<sup>16</sup> *See id.* at 1226-27. Marty Lederman writes that "insofar as the relevant question is whether the 'overall thrust' of the speech is to the public and about public concerns, the Court clearly got the answer right. The harder question . . . is why 'overall thrust' should be the proper test, and why the privately directed components of the speech (if any) should not be segregated out as possible subjects for trial." Marty Lederman, Re: "Public concern" in *Snyder v. Phelps*, CONLAWPROF (Mar. 3, 2011, 4:20 PM), <http://www.mail-archive.com/conlawprof@lists.ucla.edu/msg21217.html>.

<sup>17</sup> *See Snyder*, 131 S. Ct. at 1220 ("Our holding today is narrow."). However, Jack Balkin suggests that the Court's decision may have important implications for informational privacy law. *See* Jack M. Balkin, What Does *Snyder v. Phelps* Mean for Privacy Law?, BALKINIZATION (Mar. 3, 2011, 8:11 AM), <http://balkin.blogspot.com/2011/03/what-does-snyder-v-phelps-mean-for.html> ("Chief Justice Roberts has placed in the United States Reports an important enhancement of the distinction between matters of public and private concern that may lead to important new doctrinal developments in the area of personal privacy in the future.").

<sup>18</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

<sup>19</sup> *See generally* Transcript of Oral Argument, *Snyder v. Phelps*, 131 S. Ct. 1207 (2010) (No. 09-751), 2010 WL 3907899 [hereinafter Oral Arg. Tr.].

<sup>20</sup> *Cf. Snyder*, 131 S. Ct. at 1221 (Breyer, J., concurring,) ("As I understand the Court's opinion, it does not hold or imply that the State is always powerless to provide private individuals with necessary protection.").

<sup>21</sup> *See id.* at 1220 ("We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us.").

<sup>22</sup> *See id.* at 1221-22 (Breyer, J., concurring) ("[T]he Court has reviewed the underlying facts in

The “central thrust” language effectively accommodates, for now, the concerns of those who, like Justice Breyer, worry that the Court’s conflation of public and private speech “unreasonably limits liability for intentional infliction of emotional distress.”<sup>23</sup> Had the epic been before the Court, this accommodation may not have been possible.

Justice Sotomayor was one of several on the bench who sought to “tease out” the relevance of the plaintiff’s private or public status where the defendant’s speech was a matter of public interest:

JUSTICE SOTOMAYOR: Counsel, I’m trying to tease out the importance of the – whether the person’s a private – or public figure – a private person or a public figure. Does it make a difference if I am directing public comments to a public or private figure?

MR. SUMMERS: Well, in the context of defamation we had the Rosenbloom followed by the Gertz decision.

JUSTICE SOTOMAYOR: No, I’m talking about in terms of infliction of emotional distress. If I am talking to you as a Marine, if you were a Marine, and I was talking about the Iran war and saying that you are perpetuating the horrors that America’s doing and said other things that were offensive, would you have a cause of action because you are being called a perpetrator of the American experience?

MR. SUMMERS: I’d think there’d be – have to be a lot more facts involved, harassing type of facts. The –

JUSTICE SOTOMAYOR: But you are saying yes. So public speech, speech on a public matter, if directed to a private person, should be treated differently under the law? I think that was part of what Justice Breyer was asking. Is that what your position is?

MR. SUMMERS: Public speech, even directed to a private figure, should be treated differently than as directed towards a public official.

JUSTICE SOTOMAYOR: All right. And under what theory of the First Amendment would we do that? What case would stand for, our case, stand for the proposition that public speech or speech on a public matter should be treated differently depending on the recipient of the speech?<sup>24</sup>

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detail, as will sometimes prove necessary where First Amendment values and state-protected (say, privacy-related) interests seriously conflict . . . That review makes clear that Westboro’s means of communicating its views consisted of picketing in a place where picketing was lawful and in compliance with all police directions. The picketing could not be seen or heard from the funeral ceremony itself. And Snyder testified that he saw no more than the tops of the picketers’ signs as he drove to the funeral. To uphold the application of state law in these circumstances would punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State’s interest in protecting its citizens against severe emotional harm. Consequently, the First Amendment protects Westboro. As I read the Court’s opinion, it holds no more.”)

<sup>23</sup> *Id.* at 1221.

<sup>24</sup> Oral Arg. Tr., *supra* note 19, at 16-17; *cf. Snyder*, 131 S. Ct. at 1221-22 (Breyer, J., concurring).

In teasing out this question, the Court could have looked to *Cantwell v. Connecticut*, a case (admittedly, an aging case) which teaches that “personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . .”<sup>25</sup> In *Cantwell*, the defendant played a record that “embodie[d] a general attack on all organized religious systems as instruments of Satan” as well as a specific attack on Roman Catholic Church.<sup>26</sup> The Court reasoned that no breach of the peace had occurred because Cantwell had used no personal abuse “intended to insult or affront the hearers . . .”<sup>27</sup> Of particular importance to the Court was the evidence that Cantwell sought to persuade “willing listener[s]” and that his advocacy involved “no truculent bearing, no intentional discourtesy, no personal abuse.”<sup>28</sup> On these facts, the Court found that Cantwell “had invaded no right or interest . . . of the men accosted.”<sup>29</sup> The Court hastened to distinguish speech that *would* amount to a breach of the peace because it “consisted of profane, indecent, or abusive remarks *directed to the person of the hearer*.”<sup>30</sup> The Court employed the same reasoning in *Cohen v. California*.<sup>31</sup>

More broadly, the Court could have looked to its defamation cases for the proposition that personally targeted speech is protected only when the conduct of the plaintiff is of legitimate public concern.<sup>32</sup> None of these cases suggests that the subjective and unilateral assertions of the defendant are sufficient to make any issue a matter of legitimate concern to the public. Rather, the Supreme Court looks for a demonstrable connection between the plaintiff and some matter of public interest. In other words, the defendant must be able to argue credibly that, given the “content, form, and context” of its message, there is something about *this plaintiff* that should provide the defendant’s speech with special protection “to ensure that ‘debate on public issues [will] be uninhibited, robust, and wide-open.’”<sup>33</sup> For Westboro’s speech to be protected, the church must show that something about Matthew Snyder’s conduct should afford speech directed at him special constitutional protection to ensure robust public debate.

Of course, it can make no such showing. Or, to put it another way,

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<sup>25</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

<sup>26</sup> *Id.* at 309.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 310.

<sup>29</sup> *Id.* at 309.

<sup>30</sup> *Id.* (emphasis added).

<sup>31</sup> See *Cohen v. California*, 403 U.S. 15, 20 (1971) (“While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not ‘directed to the person of the hearer.’”) (quoting *Cantwell*, 310 U.S. at 309)).

<sup>32</sup> See Jeffrey Shulman, *Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 331-32 (2010).

<sup>33</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

it could make the same showing about anyone. For the Westboro Baptist Church, the private-public distinction is meaningless. In the church's view, the most intimate details of the private lives of private parties *are* a matter of public concern. But soldiers, just because they are soldiers, cannot be dragged into the public arena on the premise that the military conflict of which they are a part (or something even vaguer) is a public concern. Catholics, just because they are Catholics, cannot be dragged into the public arena on the premise that their church is nothing more than a whorehouse. Otherwise, every soldier, every Catholic – every one of us, no matter how assiduously we avoid the public fray – will be subject to targeted personal assault as long as speakers like the Westboro Baptist Church act under the mantle, no matter how thin, of some public concern.<sup>34</sup> What aspect of our private lives cannot be made a gratuitous part of someone's idea of public discourse?

*Snyder v. Phelps* was not an easy case. When personal invective is delivered in the milieu of public discourse, it is no simple task to balance competing constitutional and common-law interests. No doubt, there is a point where speech purportedly on a matter of public concern is so personal in content and form that it loses public import, and if the personal attacks in Westboro's epic, which addressed the Snyder family directly, do not reach this point, it is hard to imagine what would. Like many important legal boundary lines, this one is more often than not going to be difficult to draw. Nor is it clear what constitutional rule would apply to speech that crosses the line. At oral argument, Justice Breyer faced this troublesome fact with a refreshing candor:

JUSTICE BREYER: What about the – taking – if you have an instance where the defendant has said on television or on the Internet something absolutely outrageous, you showed that. You show that it was intended to and did inflict serious emotional suffering. You show that any reasonable person would have known that likelihood, and then the defendant says: Yes, I did that, but in a cause, in a cause. And now – in a cause that we are trying to demonstrate how awful the war is.

At that point I think the First Amendment might not leave this alone.

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<sup>34</sup> Cf. Stanley Fish, *Sticks and Stones*, OPINIONATOR (N.Y. TIMES) (Mar. 7, 2011, 8:00 PM), <http://opinionator.blogs.nytimes.com/2011/03/07/sticks-and-stones/#more-84096> (“The logic is that you can be as abusive and scurrilous as you like as long as the terms of your abuse can be ‘related’ to a matter of public concern; and given that the number of public concerns is infinitely large, it is almost impossible not to find such a relation if you are looking for it. Maybe the word ‘homosexual,’ when uttered, relates to a matter of public concern, but does that mean that its utterance indemnifies the entire speech context in which it occurs?”). But cf. Ari Ezra Waldman, *Private Lives of Public Concern*, PRAWFSBLAWG (Mar. 1, 2011, 1:24 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/03/private-lives-of-public-concern.html> (“Why should private matters – what we do in our bedrooms, whom we love and how we consecrate that love – be grounds for accepted hate in the public sphere? . . . The First Amendment permits a broad swath of speech and it includes often hateful comments, and just because you think something should not be discussed does not mean that everyone else agrees with you.”).



But if it's not going to leave this alone, there's where we need a rule, or we need an approach or we need something to tell us how the First Amendment in that instance will begin to – enter and force a balancing.

Is it that you want to say no, no punitive damages in such a case? Or that you would have to insist upon a particularly clear or a reasonable connection between the private part of this and the public effort?

Have you thought about that at all? Because that's where I am thinking and having trouble.<sup>35</sup>

Sooner or later, the Court will have to think about these questions again – and that is when the real trouble will begin.

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<sup>35</sup> Oral Arg. Tr., *supra* note 19, at 20-21.